INTERNATIONAL BILLS AND CHECKS.

An English author has asserted recently that "the craziness of our outfit of private law is universally recognized." If anyone doubts that the promulgator of such an opinion belongs to the hysterical school of law reformers, he should make a careful study of Mr. Conant's report of the proceedings at the Hague Conference on Bills of Exchange and Checks.[1] He will find in that document abundant evidence that at least one branch of English private law is not only free from "craziness," but commends itself to legal experts upon the Continent of Europe as a model of sanity and soundness.

This conference had two objects in view. First, the adoption of a final draft of an act unifying the law governing international bills of exchange. Second, an agreement upon the principles to be applied in drafting an act unifying the law of international checks. Both objects were attained, and attained in a manner to give great satisfaction to English-speaking lawyers.

When the original draft of the Bills of Exchange Act was brought before the Hague Conference of 1910, the representatives of Great Britain and of the United States frankly informed their conferees "that there was too much divergence betweeen the proposed law and existing British and American codes to make it practicable for them to concur fully in the uniform law".[2] Notwithstanding this declaration, they were urged to continue their membership in the Conference, and to take an active part in its deliberations. They complied with this request, and had the satisfaction of seeing many changes made in the original draft for the purpose of bringing Continental law into accord with that of English-speaking countries. Upon the reassembling of the Conference in the summer of 1912, a revised draft of the International Bills of Exchange Law was prepared, which disclosed still further changes in the direction of established rules of English law.

For example, existing Continental law conceives of a bill of exchange as a formal document. If the instrument contains certain formal provisions, it is an enforceable bill. If it does not contain them, it is void. In accordance with this idea, the original

[1]Senate Document No. 162 of the 63rd Congress, 1st Session: Report by Hon. Charles A. Conant of the International Congress on Bills of Exchange and Checks, held at the Hague in the summer of 1912.

[2]Mr. Conant's Report, p. 7.

draft declared that "a bill of exchange *must* contain" certain prescribed provisions. The revised draft reads, "a bill of exchange *should* contain" these provisions. While Continental lawyers and merchants cannot bring themselves to discard formalism altogether, they show the results of wise tutelage by their English and American associates.

There was difficulty in inducing some of the delegates in the first conference to assent to the view that a valid bill could be drawn in the same place in which it was payable, or that a bill would be valid which did not specify that value had been given for it. In the second conference, the rules of the English law were accepted without question.

Without going further into details, it is sufficient for our present purpose to note that the Uniform Law, in the form in which it has been accepted by most of the Continental and Latin-American States, approaches our law of negotiable instruments more nearly than the existing code of any of those countries. In the language of Mr. Conant, "many of the provisions of the uniform law make long strides toward that policy of liberality and flexibility which distinguishes the Anglo-American laws on bills of exchange from those of certain other countries."[3] This fact leads Sir Mackenzie Chalmers to predict that as time goes on the two systems of exchange law, which now govern the commercial world, will tend to approach each other even more nearly than at present.

We have referred to the Uniform Law as establishing a single system of rules governing bills of exchange for all commercial countries which have not adopted the English system. Broadly speaking this is true. In some matters, however, that act reserves to the contracting States the right to depart from the rules, or to exclude certain matters from its operation. For example, Article 18 of the Uniform Law[4] permits an indorsement to contain the stipulation, "'value as security,' 'value as pledge,' or any other words implying a pledge," and declares that a holder, under such indorsement, may further indorse it, but only in the capacity of agent. But Article 4 of the Convention between the Adopting States,[5] declares that each contracting State may prescribe that such an indorsement made within its territory shall be deemed void. On a dozen points of varying importance similar reservations are

[3] *Ibid.* p. 7.

[4] *Ibid.* pp. 48-49.

[5] *Ibid.* p. 38.

made. It results, as the Committee on Revision points out,[6] that "uniformity will not be complete, at least immediately." The Committee adds:

"The present project therefore is in substance only a first step, but a capital and decisive step made in the path of the unification of the laws. The various States, enlightened by experience, may, let us hope, decide later not to avail themselves of all or a part of these reservations and may perhaps consent, in the conferences of revision which they will hold, even to annul some of those of the convention, and our successors, more fortunate than ourselves, may be able to reach results more nearly complete than those which it is possible for us to obtain at the present time."[7]

Passing to the second purpose of the Hague Conference of 1912—agreement upon the draft act covering the topic of checks—our attention is arrested by two prominent facts: the more advanced development of English law and the superiority of its rules as compared with those prevailing in Continental countries. The English system is based upon the usages of commercial classes. Both courts and legislatures have accepted the theory that "bankers and merchants know their own business better than any legislature can know it, and the interests of commerce are best served by leaving them free, as far as possible, to make their own bargains and arrangements."[8] Hence, judicial decisions attempt to give effect to mercantile usage, unless this is clearly inconsistent with the public welfare; and legislation has sought to do no more than codify rules which have proved themselves useful in promoting honest and efficient business. It has resulted that the English law of checks has developed into a most liberal and flexible body of rules, and is not characterized by the spirit of rigidity and formalism which prevails under the Continental system.

Because of the wide divergence between the two systems, both the English government and our own instructed their delegates to the Hague not to hold out any hope that they would become parties to the convention. Secretary Knox further counseled our delegate:

"That even in co-operating with the delegates of Great Britain, you should bear in mind the difference between the system of making laws in the two countries—the system of law governing contracts and bills of exchange being chiefly in the United States the

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[6] *Ibid.* p. 273.

[7] *Ibid.* p. 273.

[8] Sir Edward Grey's Instructions to the English Delegates, Mr. Conant's Report, p. 384.

province of the State governments and not of the Federal Government. This fact would limit the ability of the Federal Government to enter into a binding contract or treaty in regard to the law of bills even if no other obstacles existed to such an agreement. * * * If a draft of a uniform law on checks is prepared * * * you are directed to call attention to the fact that, in respect to this measure as in respect to bills, it is not in accord with existing interpretations of the power of the Federal Government to override the laws of the States regarding checks circulating exclusively within their limits."[9]

Accordingly, Mr. Conant was asked to follow closely the proceedings of the conference, to report the conclusions to the State Department, and to exercise such influence as he could to remove obstacles to the use of checks in international commerce. The first contribution of the American delegate to the work of the conference was his answer to the *Questionnaire* on checks.[10] It was the result of conference and correspondence with many commercial bodies as well as with individuals of special experience in this branch of our law, and sets forth very clearly the legal rules governing checks in this country. In another part of the report,[11] these rules are contrasted with those now obtaining on the Continent. It will be interesting to note some of these points of difference.

In the first place, Continental law does not conceive of a check as a species of the bill of exchange. With us it is defined as a bill of exchange drawn on a bank, payable on demand,[12] "and thus is subject to most of the rules governing bills. It does not need to bear the label of a check." On the Continent such label is an essential condition to its validity. In some countries, the date of the check is "to be spelled in letters, rather than written in figures,"[13] and a different stamp tax is imposed upon checks payable in the place where they are drawn, from that imposed upon checks payable elsewhere. Such regulations interfere seriously with the use of checks and account for the limited employment of these instruments in Continental countries.

In the proposed draft of the Uniform Law, it is declared that an instrument is not valid as a check unless it contains the word

[9]Mr. Conant's Report, pp. 371-372.

[10]*Ibid.* pp. 372-380.

[11]*Ibid.* pp. 16-28.

[12]N. Y. Negot. Inst. Law, § 321.

[13]See 21 Commercial Laws of the World, 189, for the French law.

"check" in the body of the instrument.[14] That is, the check is to be sharply differentiated from the bill of exchange. Following out this idea, Article 11[15] declares that a check cannot be accepted, and any declaration of acceptance made upon it is void. This provision prohibits the certification of checks, and Continental jurists deem a certification incompatible with the nature of these instruments. The business of the drawer is to pay, not to promise; and the drawer is bound to have funds available for payment at the time of drawing the check.[16] Nevertheless, as a concession to commercial usage in countries applying English law, the draft act provides that the "power shall be reserved to the contracting States to permit acceptance, certification, or the visa of a check and to determine its effects."[17] Mr. Conant suggests that the use of American checks may be facilitated in European and Latin-American countries, by having the printed form contain the word "check." The presence of this word would do no harm here and would disarm mercantile prejudice there.

The English Bills of Exchange Act declares that notice of the death of a depositor revokes the authority of the banker to pay a check. The American statute is silent upon this topic, and the decisions of our courts are not uniform.[18] Article 16 of the proposed draft[19] gives effect to the Continental view that "the effect of a check shall not be impaired by the death of the drawer nor any incapacity on his part occurring after its issue." If a check is an assignment to the payee of the drawer's funds in the drawee's hands the foregoing provision is unquestionably correct. That doctrine would justify also Article 17 of the proposed draft,[20] which prohibits the drawer of a check from revoking it, until after the expiration of the time limit for presentment. Here again Continental law runs counter to that of England and America. We permit revocation; and Mr. Conant assured the Conference that he had heard of many cases where an attempt at swindling was frustrated by stopping the payment of a check, but he did not recall having heard of any abuse or fraud being perpetrated by means of the revocation. A similar assurance was given by one

[14]Mr. Conant's Report, p. 66.
[15]*Ibid.* p. 68.
[16]*Ibid.* pp. 329-330.
[17]Art. 11, Mr. Conant's Report, p. 68.
[18]2 Daniel, Negot. Inst. (6th ed.) § 1618 (b).
[19]Mr. Conant's Report, p. 69.
[20]*Ibid.* p. 69.

of the British delegates.[21] A strong argument for the adoption of our practice was made by the Hungarian delegate,[22] who insisted that it would act as an inducement to many persons to open check accounts who are now afraid to do so. He declared that it is often difficult to persuade a man of independent means or a landowner to take a check book from his banker. He fears it "as a very dangerous object." But the delegate thought this fear would be allayed, if the depositor understood that he could revoke a check which had been obtained from him by fraud.

Closely connected with this right of the drawer to revoke is the right of the holder to sue the drawer of a check. Such right is explicitly negatived by the American statute,[23] and the proposed draft leaves it "outside the scope of international regulation."[24] The discussions in the Conference disclosed the fact, however, that the American doctrine will be accepted by most of the powers.[25]

Mr. Conant assures us that "the one long, firm step to facilitate the wider use of the check, which the majority of the powers came to the Conference ready to take, was the adoption of the English system of the 'Crossed Check.'" In fact, only Germany and Austria were squarely opposed to this system. They preferred their own practice which permits the drawer of a check to forbid its payment in cash by inserting on the face transversely the declaration "for collection," "for deposit only" or an equivalent expression; and they succeeded in having this practice recognized in Article 20 of the proposed draft.[26] However, the English system commended itself to a majority of the powers and it was formulated in Article 19 of the proposed draft,[27] as follows:

"The check crossed on its face by two parallel transverse lines shall be paid only to a banker. The crossing may be done by the drawer or by a holder. The crossing may be either general or special. The crossing shall be deemed general, if the check bears between the two transverse lines no designation or the word 'banker,' or some equivalent term, or only the words 'and company;' it shall be deemed special if the name of a banker is in-

[21] *Ibid.* p. 261.

[22] *Ibid.* pp. 261-264.

[23] N. Y. Negot. Inst. Law, § 325. For the arguments and decisions in favor of the right to sue, see 2 Morse, Banking (4th ed.) §§ 499-538.

[24] Art 21, Mr. Conant's Report, p. 71.

[25] Mr. Conant's Report, pp. 251-254.

[26] *Ibid.* pp. 70, 218-222.

[27] *Ibid.* p. 70. The corresponding sections of the Bills of Exchange Act are 76-82. An interesting discussion of the two systems is reported by Mr. Conant, at pp. 216-225.

serted between two lines. A general crossing may be converted into a special crossing, but a special crossing can not be converted into a general crossing. A check crossed specially can be paid only to the banker designated. The latter, however, if he can not make the collection himself, may substitute the name of another banker. To erase the crossing or the name of the designated banker is prohibited. A drawee who pays a crossed check to a person other than a banker, if the crossing is general, or to a person other than the banker designated, if the crossing is special, shall be liable for the injury caused, if any occurs, but the damages shall not exceed the amount of the check. The power shall be reserved to the contracting States to prohibit the system of crossed checks for checks payable within their own territory."

The Conference was informed by one of the English delegates that "the immense majority of checks circulating in England are crossed;" that bankers always supply check books with crossed checks unless specially requested by customers to provide them with uncrossed checks;[28] and that since the Statute of 1906,[29] amending § 82 of the Bills of Exchange Act, there is little danger to the drawer, or to the collecting bank from the use of crossed checks.

Originally, checks on bankers, as distinguished from bills of exchange, were drawn payable to bearer. As a result of this mercantile habit, some writers and judges thought that an instrument could not be a check, unless it was payable to bearer.[30] That view was not accepted by bank depositors, who undertook to protect themselves against the possibility of their checks getting into wrong hands by making them payable to order, or by crossing them. If a check was payable to order, it became the duty of the paying bank to pay only upon the genuine indorsement of the payee. English bankers objected to having this responsibility cast upon them, and secured the passage of an act exempting them therefrom, in cases where they had paid checks "in good faith and the ordinary course of business."[31] They did not object, however, to the practice of crossing checks, though the legal effect of cross-

[28]Mr. Conant's Report, pp. 217-221.

[29](1906) 6 Edw. 7, c. 17: "A banker receives payment within the meaning of § 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof." This was enacted to change the rule recognized in Capitol & Counties Bank *v.* Gordon (1903) A. C. 240.

[30]In Woodruff *v.* The Merchant's Bank (N. Y. 1841) 25 Wend. 673, 675, Nelson, C. J., said, "It is essential to a check *eo nomine,* or bank draft, that it be payable to *bearer* and *on demand.*"

[31]Stamp Act (1853) 16 & 17 Vict., c. 59, § 19, continued in Bills of Exchange Act, § 60.

ing was a matter of differences of opinion, until the decision in *Bellamy* v. *Marjoribanks*.[32] The plaintiff in this case drew his check to bearer and crossed it with these words, "Bank of England, for account of Adjutant General." The bearer drew his pen through this crossing and wrote underneath it the name of his own banker with whom he deposited the check to his private account, and to whom it was paid by the drawee bankers. Plaintiff secured the finding of a jury that "there was a custom and usage, and a consequent duty upon the defendants (the drawee bankers), not to pay the check otherwise than into and through the hands of the Bank of England." It was held by the Court of Exchequer however, that no such custom or usage existed, or would be valid; that such crossing was a mere memorandum that the check was to be presented through the banker named; that it was not an essential part of the instrument, and that when the original crossing was cancelled by the holder and another banker named, the drawee bank was not negligent in paying it through him.[33]

Parliament attempted to modify the doctrine of the foregoing case,[34] but the statute did not accomplish much, as the Exchequer Chamber held that a crossing could be erased without invalidating the check, when it could be paid by the drawee bank, as though it had never been crossed.[35] Indeed, Baron Bramwell characterized the legislation as drawn by one who "was evidently ignorant of the law," and as "an abortive attempt to perform the impossible feat of rendering a draft which upon the face of it purports to be payable to the bearer not payable to him." Not abashed by these uncomplimentary remarks, Parliament continued to amend the law, until the statutory provisions[36] were substantially those which have been set forth in the proposed draft of the Hague Conference.

In this country, the practice of crossing checks has not been

[32](1852) 7 Exch. *389. The form of the "crossed check" involved is given at p. 392, n. (a).

[33]Baron Parke, at pp. 402-405, sketches the history of this practice and explains the advantages. He says, checks payable to bearer are liable to get into the hands of those not entitled to receive them. The crossing of a check limits its payment to a banker, who, ordinarily, is a person of respectability, and who will not lend himself to dishonest practices, and through whom it is easy to trace the person who received the proceeds of the check. "It is manifestly a great protection and safeguard to the real owner," he adds, "that there should exist the means of tracing and ascertaining for whose use the money paid on a check is received."

[34]An Act to amend the Law relating to Drafts on Bankers, (1856) 19 & 20 Vict. c. 25.

[35]Simmons *v.* Taylor (1858) 4 C. B. [N. S.] 463, 27 L. J., C. P. 248.

[36]Bills of Exchange Act (1882) §§ 76-82.

followed, because the drawer can accomplish all that is sought for in England by crossing, and more, by drawing his check to order. It then becomes incumbent on the drawee bank to pay only to the holder who can trace title through a genuine indorsement of the payee.[37] In order that the banker may have his recourse against the person presenting for payment a check with a forged indorsement, he is entitled to have such person identified.[38] If the banker requires the holder to indorse the check as a condition of paying it, the holder cannot sue him,[39] though such conduct has been held to amount to a dishonor of the instrument.[40]

While our practice of making checks payable to order relieves us from "crossing" them, in domestic transactions, Mr. Conant points out that "the crossing of checks has made some headway among American bankers in the case of checks drawn by them and likely to be negotiated or paid abroad." He suggests that statutory sanction be given by our state legislatures to this growing practice. In case the proposed draft is adopted by the powers represented in the Hague Conference, such legislation should be copied from its provisions in order to insure the largest possible measure of uniformity.[41]

No one can study Mr. Conant's report without reaching the conclusion at which he arrives, that the tendency among the powers represented in the Conference, is towards the acceptance of the Anglo-American check system. Even though not yet ready to adopt the system in full, they recognize "its greater flexibility as well as its greater adaptation to commercial development than their own systems." At the next meeting of the Conference, British and American delegates can undoubtedly exercise a potent influence towards the elimination of unnecessary formality and the acceptance of the simpler rules which govern the use of checks in this country. A uniform international code, embodying such rules, "will contribute to the convenience and security of American bankers, exporters and producers."

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[37]Shipman *v.* Bank (1891) 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. R. 821; Murphy *v.* Metropolitan Nat. Bank (1906) 191 Mass. 159, 77 N. E. 693, 114 Am. St. R. 595.

[38]Michie, Banks & Banking, § 138 (10 B.). Mr. Conant's Report, p. 23.

[39]Bank of the Republic *v.* Millard (1869) 77 U. S. (10 Wall.) 152; N. Y Negot. Inst. Law, § 325.

[40]McCurdy *v.* Soc. of Savings (1882) 6 Ohio Dec. (Reprint) 1169.

[41]Mr. Conant's Report, pp. 23-24.